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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JULIE SEJPAL, VINOD SEJPAL and ERICA LYNN SEJPAL, a minor, by Julie Sejpal, her guardian,

Petitioners,

—v.—

CORSON, MITCHELL, TOMHAVE & MCKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. MCKINLEY, DONALD R. MCKINLEY and CONEMAUGH VALLEY MEMORIAL HOSPITAL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Pennsylvania statute, 42 Pa. Cons. Stat. Ann. § 8305, that prohibits civil tort claims for "wrongful life" and "wrongful birth" violates petitioners' fundamental right to make procreative decisions or, by its purpose or effect, imposes an "undue burden" on a woman's right to choose abortion?

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are set forth in the caption on the cover of this petition. Notice has been given to the Attorney General of Pennsylvania pursuant to Pa. R. Civ. P. 235 and Pa. R. App. P. 521(a).

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No. 93-____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

JULIE SEJPAL, VINOD SEJPAL, and ERICA LYNN SEJPAL,
a minor, by Julie Sejpal, her guardian,

Petitioners,

v.

CORSON, MITCHELL, TOMHAVE & MCKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. MCKINLEY, DONALD R. MCKINLEY, AND CONEMAUGH VALLEY MEMORIAL HOSPITAL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

Petitioners Julie Sejpal, Vinod Sejpal and their daughter, Erica Lynn Sejpal, respectfully pray that a writ of certiorari issue to the Supreme Court of Pennsylvania, Western District, to review a December 28, 1993, order denying the Sejpals' Petition for Allowance of Appeal.

OPINIONS BELOW

In an unreported opinion and order dated March 4, 1992, the Court of Common Pleas of Cambria County, Pennsylvania, Civil Division, granted respondents' Preliminary Objections in the Nature of Demurrer or Motion to Strike and pursuant to 42 Pa. Cons. Stat. § 8305, dismissed petitioners' civil causes of action

for "wrongful birth" and "wrongful life." *Sejpal v. Corson*, No. 1991-2288-A (Pa. Ct. C.P. Mar. 4, 1992), 12a.[1] Also in unreported orders, the Superior Court of Pennsylvania, Pittsburgh District, affirmed the Judgment of the Court of Common Pleas on January 26, 1993, and on April 2, 1993, denied petitioners' Application for Reargument. *Sejpal v. Corson*, No. 581 (Pa. Super. Ct. Jan. 26, 1993), 3a; *Sejpal v. Corson*, No. 581 (Pa. Super. Ct. April 2, 1993), 11a. The Supreme Court of Pennsylvania, Western District issued a final order, in the form of a letter, denying the Sejpals' Petition for Allowance of Appeal on December 28, 1993. *Sejpal v. Corson*, No. 0209 (Pa. Dec. 28, 1993), 2a.[2]

JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1257(a) (1988).

STATUTES INVOLVED

Act of 1988, April 13, (P.L. 366, No. 47 § 2), 42 Pa. Cons. Stat. § 8305, which prohibits causes of action for "wrongful birth" and "wrongful life."[3]

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[1] The opinions and orders are reprinted in the Appendix to this Petition For A Writ Of Certiorari. Citations to this Appendix are made to the page number therein as ___a.

[2] On March 21, 1994, Justice Souter granted until May 12, 1994, Petitioners' Application for Extension of Time in Which to File this Petition. 1a.

[3] 42 Pa. Cons. Stat. § 8305 provides:

> (a) Wrongful birth. -- There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born.

(continued...)

STATEMENT OF THE CASE

Although arising in the context of a single tort action, this case raises substantial constitutional questions of grave importance to thousands of women, both in Pennsylvania[4] and throughout the United States.[5]

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[3] (...continued)

> Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman, or on account of physical injury suffered by a woman or a child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defense against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or any other act regulating the professional practices of health care practitioners.
>
> (b) Wrongful life. -- There shall be no cause of action on behalf of any person based on a claim that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.

[4] The incidence of chromosomal abnormalities in liveborn infants is estimated to be between 1 in 50 and 1 in 200, and averages 1 in 178 live births (0.56%), Jack A. Pritchard et al., *Williams Obstetrics* 800 (17th ed. 1985) [hereinafter *Williams Obstetrics*], affecting approximately 928 children in Pennsylvania each year. National Center for Health Statistics, *Annual Summary of Births, Marriages, Divorces, & Deaths: U.S., 1992*, Monthly Vital Statistics Report, v. 41, No. 13 (Sept. 28, 1993) (Table 1) (reporting 165,206 births in Pennsylvania in 1992).

[5] Eight other states have enacted similar statutes that prohibit tort actions recoverable for "wrongful birth" or "wrongful life." *See* Ind. Code Ann. § 34-1-1-11 (Burns 1993) ("wrongful life" outlawed); Minn. Stat. § 145.424 (1993); Mo. Rev. Stat. § 188.130 (1992); N.C. Gen. Stat. § 14-

(continued...)

On August 30, 1989, Julie Sejpal gave birth to her daughter, Erica Lynn Sejpal, who was born with Down syndrome. Throughout her pregnancy, Ms. Sejpal received gynecological and obstetrical care from the five physician respondents, Drs. Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley, and Donald R. McKinley, who share a group practice incorporated as Corson, Mitchell, Tomhave & McKinley, M.D.S., Inc. (Corson, Mitchell). Ms. Sejpal delivered her daughter at and received post-partum care for herself and Erica from respondent Conemaugh Valley Memorial Hospital, where the Corson, Mitchell physicians have full privileges.

Ms. Sejpal first contacted Corson, Mitchell in January 1989 for a pregnancy test. On January 20, 1989, the date of her first obstetrics appointment with Dr. Robert Tomhave, Ms. Sejpal was 36 years old. As a teacher of disabled children who knows intimately the difficulties of raising children with Down syndrome, Ms. Sejpal was concerned that she might be at greater risk for fetal anomalies than would a younger woman. Therefore, she asked her physician whether she should undergo genetic testing, specifically amniocentesis. Dr. Tomhave provided Ms. Sejpal with information about three prenatal tests that may detect fetal anomalies: the Maternal Serum Alpha-FetoProtein blood assay ("MSAFP"), chorionic villus sampling, and amniocentesis.[6] However, Dr. Tomhave discouraged Ms. Sejpal from undergoing

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[5] (...continued)
45.1 (1993); N.D. Cent. Code § 32-03-43 (1993) ("wrongful life" outlawed); S.D. Codified Laws Ann. § 21-55-2 (1987); Idaho Code § 5-334 (1986); Utah Code Ann. § 78-11-24 (1993).

[6] Maternal Serum Alpha-FetoProtein test is a blood assay that tests for heightened levels of a protein produced by the fetal liver and passed into the mother's blood via the placenta. The Columbia University College of Physicians and Surgeons, *Complete Guide to Pregnancy*, 304 (W. Duane Todd, M.D. et al. eds. 1988). Chorionic villus sampling is the extraction and examination of a small fragment of the early placenta. *Id.* at 307. Amniocentesis is a technique in which a sample of amniotic fluid is extracted and examined. *Id.* at 305.

amniocentesis, stating that chorionic villus sampling or amniocentesis were only performed if the MSAFP test indicated a problem.

Two months later, on March 17, 1989, Ms. Sejpal underwent an MSAFP blood assay test ordered by Dr. Donald McKinley. The results of the MSAFP test, which were returned to the group practice on March 24, 1989, showed that Ms. Sejpal was at a greater than normal risk for giving birth to a child with Down syndrome. The lab report contained the specific warning: "Patient should be informed of the availability of sonar and amniocentesis. Genetic counseling is available to discuss modified risk and options for further testing."[7]

Despite the lab report and warning, Dr. Tomhave and other respondents never informed Ms. Sejpal or her husband of these results, never discussed with Ms. Sejpal the recommendation that she undergo amniocentesis, nor provided Ms. Sejpal or her husband with genetic counseling. The physicians never discussed alternatives for prenatal care, labor or delivery, or post-partum care, which might have better prepared the Sejpals for the birth of a disabled child, nor did they discuss the option of terminating the pregnancy by abortion. *See* Deposition of Julie Sejpal, March 8, 1994 (Sejpal Dep.) at 87-89a; Complaint at ¶¶ 18-27, 19-24a.[8]

Instead, Dr. Donald McKinley advised Ms. Sejpal to undergo an ultrasound test, which when performed on March 28,

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[7] *See* MSAFP test results ("Adjusted risk for Down Syndrome greater than 1/270"), 83a.

[8] Because the Court of Common Pleas dismissed the Sejpals' claims for wrongful birth and wrongful life on Preliminary Objections, the facts alleged in Petitioners' Complaint must be taken as true and reviewed in the light most favorable to petitioners. *See Gabel v. Cambruzzi*, 616 A.2d 1364, 1367 (Pa. 1992). The testimony of Ms. Sejpal, given under oath at her deposition, is an example of the evidence the Sejpals would present if permitted to go forward with a trial.

1989, showed that Ms. Sejpal's pregnancy was not progressing as expected. These ultrasound results coupled with the MSAFP blood test results provided yet another signal that Ms. Sejpal was at serious risk for giving birth to an infant with chromosomal abnormalities. But despite these clear indicators of fetal anomaly, Dr. Donald McKinley advised Ms. Sejpal that everything was fine, and merely suggested that her pregnancy was not as far advanced as he had previously believed. In response to her specific question about whether the blood assay test should be repeated, Dr. McKinley again reassured Ms. Sejpal that everything was fine and that there was no need to repeat the test. The same question was put to Dr. Robert McKinley at a subsequent prenatal visit on July 14, 1989; he also assured Ms. Sejpal that additional genetic testing was unnecessary, noting that it was too late to do a retest. Sejpal Dep. at 90-91a. By failing to suggest further genetic testing that would discern fetal anomalies, the physicians deprived Ms. Sejpal and her husband of accurate information upon which to decide whether to terminate the pregnancy.

On August 30, 1989, Dr. Richard McKinley delivered Erica by Cesarean section under spinal anesthesia. After the delivery, a nurse wrapped Erica in a blanket and only briefly showed her to her parents before rushing off. In response to repeated questioning by Dr. McKinley, the nurse claimed that the baby was fine but that she needed some oxygen. Sejpal Dep. at 91-92a.

Prior to delivery, on August 24, 1989, Ms. Sejpal had given her informed consent for a fallopian tubal ligation, a method of female sterilization,[9] to be performed immediately after the delivery, while Ms. Sejpal was still in the operating room and under partial anesthesia. Following the delivery, Dr. Richard McKinley performed the tubal ligation without first informing the

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[9] Fallopian tubal ligation is a surgical procedure in which a variety of techniques are employed to disrupt tubal potency and thereby thwart the union of sperm and egg. *Williams Obstetrics*, at 827.

Sejpals of Erica's condition and without determining whether Ms. Sejpal's initial grant of consent remained voluntary and informed. Significantly, Ms. Sejpal learned of Erica's Down syndrome from her husband only after her sterilization was completed. Had Ms. Sejpal known of Erica's condition prior to the tubal ligation, she would have chosen to withhold consent, preserving the option of having another child at some future date. Sejpal Dep. at 90a.

In their Complaint, petitioners allege that respondents failed to inform Ms. Sejpal about the results of the MSAFP test; misinterpreted the results of her ultrasound test; failed to provide Ms. Sejpal with appropriate information about further genetic testing that would have detected Down syndrome, including chorionic villus sampling or amniocentesis; failed to offer Ms. Sejpal and her husband appropriate genetic testing and counseling; failed to advise the Sejpals immediately that Erica had been born with Down syndrome; and failed to determine whether Ms. Sejpal's consent to her sterilization by tubal ligation remained voluntary and informed. Petitioners alleged that, but for the negligent acts of the physicians and the hospital, Ms. Sejpal would have had the appropriate information necessary to decide whether to terminate her pregnancy; Ms. Sejpal would have chosen abortion; and Ms. Sejpal would not have undergone the Cesarean section or the sterilization at the time of Erica's birth. They therefore sought damages for "wrongful birth" and "wrongful life."

Relying upon 42 Pa. Cons. Stat. § 8305, respondents filed Preliminary Objections in the Nature of Demurrer or Motion to Strike, seeking to dismiss the Sejpals' "wrongful birth" and "wrongful life" claims. In response, petitioners asserted that 42 Pa. Cons. Stat. § 8305 violated their rights to privacy guaranteed by the 14th Amendment of the United States Constitution.[10]

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[10] It was at this stage of the proceedings below that the federal question sought to be reviewed here was first raised. *See* Plaintiffs' Answer to Preliminary Objections of Defendants Corson, Mitchell, et al., dated Jan.

(continued...)

Granting respondents' Preliminary Objections and dismissing petitioners' claims pursuant to 42 Pa. Cons. Stat. § 8305,[11] the Court of Common Pleas of Cambria County, Pennsylvania found that "these statutes do not violate the due process clause and other provisions of the United States Constitution." *Sejpal v. Corson*, No. 1991-2288-A, 13a. The lower court denied the Sejpals an opportunity to prove at trial that Pennsylvania's "wrongful life" and "wrongful birth" statute interferes with an individual's fundamental right to make procreative decisions or that the law imposes an "undue burden" on a woman's abortion choice because it has the "purpose or effect of placing a substantial obstacle in the path of a woman who seeks an abortion of a nonviable fetus." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2820 (1992).

Specifically, had the Sejpals been permitted to go forward with their case, they would have proven at trial that the statute, which prevents children born with birth defects and their parents from bringing claims for damages, impermissably insulates physicians from liability for failure to advise women about the availability of genetic tests that will detect fetal anomalies and for failure to counsel pregnant women about the risks of birth defects. The "wrongful birth" and "wrongful life" statute gives legal protection to those physicians who provide false or misleading information to their patients or who purposefully withhold from their patients information central to the exercise of informed reproductive decision-making including: which, if any, pregnancy-related health care and genetic testing is appropriate for the pregnant woman, whether to continue a pregnancy to term

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[10] (...continued)
31, 1992, 60a; Plaintiffs' Answer to Preliminary Objections of Defendant Conemaugh Valley Memorial Hospital, dated Jan. 31, 1992, 63a.

[11] The Court of Common Pleas also granted respondents' Preliminary Objections and dismissed petitioners' Unfair Trade Practices and Consumer Protection Act claims. Petitioners do not appeal that dismissal.

or to have an abortion, and what options the woman may choose with respect to future childbearing. Moreover, the Sejpals would have proven that, when passing the statute, the Pennsylvania General Assembly explicitly intended to prevent women from using genetic testing and choosing abortion.

The Superior Court of Pennsylvania affirmed the order of the lower court and denied petitioners' request for reargument.[12] Denying the Sejpals' Petition for Allowance of Appeal, the Supreme Court of Pennsylvania left in place the improper dismissal of petitioners' "wrongful birth" and "wrongful life" claims and finally denied them the opportunity to demonstrate that the statute is unconstitutional. *See Sejpal v. Corson*, No. 0209, 2a.

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[12] The Superior Court did not address the merits of petitioners' constitutional claims. After finding that petitioners' "wrongful birth" and "wrongful life" claims "would not have supported a recovery because they specifically are precluded by 42 Pa. Cons. Stat. §§ 8305(a) and (b)," the court declined to consider petitioners' claim that the statutory preclusions are unconstitutional under *Planned Parenthood v. Casey*. *Sejpal v. Corson*, No. 581, 7a. The Superior Court found "this issue waived since the Commonwealth was not a party to the action and [the court's] examination of the record reveals no indication that appellants provided the Attorney General of Pennsylvania with notice of their constitutional challenge in accordance with Pa. R. App. P. 521(a)." *Id.* at 8a. In their Motion for Reconsideration and Reargument, petitioners, who were represented by different counsel than appear here, submitted three proofs of service as proof that the Attorney General had been notified, *see* Application for Rearguement at 66a, but that the Attorney General declined to appear before the Superior Court to defend the statute's constitutionality. Even assuming *arguendo* that appropriate notice was not provided by previous counsel, this procedural error should not bar consideration of the grave constitutional questions at issue here, particularly since the Attorney General will have ample opportunity to respond to this petition and to participate in the litigation in the event *certiorari* is granted.

REASONS FOR GRANTING THE WRIT

This case presents matters of grave public importance affecting the ability of women and families to make fully informed procreative decisions. While the principles to be applied are based on settled precedent, the application of those rules to the particular context of a state statute barring tort actions for "wrongful birth" or "wrongful life" has not yet,[13] but should be, settled by this Court. Thus, this case meets the standards for granting a writ of certiorari set forth in Sup. Ct. R. 10.1(c).

I. THE CHALLENGED STATUTE VIOLATES AN INDIVIDUAL'S FUNDAMENTAL RIGHT TO MAKE PROCREATIVE DECISIONS.

A. By Insulating From Liability Those Physicians Who Interfere With Women's Procreative Liberties, The State Participates Directly In The Constitutional Violation.

The constitutionality of 42 Pa. Cons. Stat. § 8305, which prohibits tort actions for "wrongful birth" and "wrongful life," is the central issue in this case. "Wrongful birth" suits arise when a physician fails to advise a woman of the possibility of genetic testing, fails to discover diagnosable genetic or congenital disorders, or fails to inform a woman of this diagnosis, thereby preventing her from making an informed choice whether to continue or terminate her pregnancy by abortion. "Wrongful life" suits are brought by a child suing for damages resulting from his or her own birth under similar circumstances. The recovery of damages can provide essential funds to help defray the exorbitant

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[13] This Court has previously denied *certiorari* in similar cases. *See Wilson v. Kuenzi*, 751 S.W.2d 741 (Mo.), *cert. denied*, 488 U.S. 893 (1988); *Azzolino v. Dingfelder*, 337 S.E.2d 528 (N.C. 1985), *cert. denied*, 479 U.S. 835 (1986); *Edmonds v. W. Pa. Hosp. Radiology Assoc.*, 607 A.2d 1083 (Pa. Super. 1992), 621 A.2d 580 (Pa.), *cert. denied*, 114 S. Ct. 63 (1993).

expenses that families incur in providing necessary medical care, psychological treatment, and educational services for severely disabled children. *See* Wilbur L. Tomlinson, *Torts - Wrongful Birth and Wrongful Life*, 44 Mo. L. Rev. 167, 174-75 (1979).

As the Pennsylvania General Assembly recognized when passing this statute, tort actions also serve the purpose of discouraging behavior viewed by society as undesirable. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 1, at 6-7 (5th ed. 1984). Indeed, the risk of medical malpractice actions has been recognized as a general deterrent to poor medical practices, and a key factor contributing to proper practice. *See* Peter A. Bell, *Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 Syracuse L. Rev. 939, 966-68 (1984) (reporting that the threat of wrongful birth and other malpractice liability changes physician behavior).[14]

Although the state has considerable latitude to regulate damage awards in personal injury cases, it cannot, as here, exercise this power in a way that unconstitutionally interferes with a woman's fundamental right to make procreative decisions, *see infra* Point I.B., or in a manner that places a substantial obstacle in the path of a woman who chooses abortion. *See Casey*, 112 S. Ct. at 2820; *infra* Point II. Some courts have

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[14] In *Troppi v. Scarf*, 187 N.W.2d 511, 517 (Mich. Ct. App. 1971), the Michigan Court of Appeals discussed the deterrent effect of tort claims when deciding whether there is a claim for "wrongful life" or "wrongful birth" when a pharmacist fails to dispense contraceptive drugs accurately:

> [T]he imposition of civil liability encourages potential tortfeasors to exercise more care in the performance of their duties, and, hence, to avoid liability producing negligent acts . . . . [P]ublic policy favors a tort scheme which encourages pharmacists to exercise great care in filling prescriptions. To absolve defendant of all liability here would be to remove one deterrent against the negligent dispensing of drugs.

dismissed petitioners' constitutional challenges to "wrongful life" and "wrongful birth" statutes because it is the physician, not the state, who provides false or misleading information to or withholds full and accurate information from women. *See, e.g., Edmonds v. W. Pa. Hosp. Radiology Assoc.*, 607 A.2d 1083 (Pa. Super. 1992), 621 A.2d 580 (Pa.), *cert. denied*, 114 S. Ct. 63 (1993); *Dansby v. Thomas Jefferson Univ. Hosp.*, 623 A.2d 816 (Pa. Super. 1993); *Flickinger v. Wanczyk*, 843 F. Supp. 32 (E.D. Pa. 1994).[15] These courts failed to recognize, however, that so long as the physician's conduct is protected by statute, the injury suffered by the woman carries the state's imprimatur. Through its insulating legislation, the Commonwealth directly supports and encourages physicians who interfere with women's procreative choices, and thereby participates directly in the constitutional violation. *See Robak v. United States*, 658 F.2d 471 (7th Cir. 1981) ("Any other ruling would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses, which, if born, would suffer from genetic . . . defects."); *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981); *Berman v. Allan*, 404 A.2d 8 (N.J. Super. 1979); *cf. Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 69, 74-75 (1976) (state cannot delegate to third party a power that it does not itself possess).[16]

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[15] None of these decisions considered whether the challenged statute had "the purpose . . . of imposing a substantial obstacle in the path of a woman seeking an abortion." *Casey*, 112 S. Ct. at 2820. *See infra* Point II.A. Neither did the lower courts hold an evidentiary hearing about how the statute infringes upon fundamental rights to procreation and imposes an "undue burden" on a woman's abortion choice.

[16] In *Troppi*, 187 N.W. at 517, the Michigan Court of Appeals also recognized that the denial of a tort remedy for negligence in dispensing contraceptives would infringe upon an individual's constitutional right to use contraception. The Court noted:

> The State may not infringe upon the rights of husband and

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B. The Challenged Statute Impermissibly Interferes With An Individual's Procreative Decisions And Is Not Narrowly Drawn To Serve A Compelling Interest.

This Court has long recognized rights of privacy and bodily integrity. As early as 1891, it held,

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . .

Union Pacific R.R. Co. v. Botsford, 141 U.S. 250, 251-52 (1891). Throughout the last century, this Court has recognized that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as childrearing, marriage, procreation, and contraceptive choice. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). These cases embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny must remain free from unwarranted governmental intrusion. *Eisenstadt*,

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[16] (...continued)

> wife to use contraceptives to limit the size of their family. Since the state may not infringe upon this right, it may not constitutionally denigrate the right by completely denying protection provided as a matter of course to like rights.

187 N.W. at 517. *See also Bowman v. Davis*, 356 N.E.2d 496, 499 (Ohio 1976) ("For this court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations except those involving sterilization would constitute an impermissible infringement of a fundamental right").

405 U.S. at 453.

Recently, in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, this Court reaffirmed the correctness of these decisions, finding that

> [t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

Id. at 2807.

That the panoply of protected rights includes an individual's right to control a full range of medical decisions about procreation is without doubt. This Court and others have guaranteed as fundamental the right to use contraception, *Griswold*, 381 U.S. at 485, the right to be free from coercive contraception, *People v. Pointer*, 199 Cal. Rptr. 357, 364 (Cal. Ct. App. 1984), the right to voluntary sterilization, *Ruby v. Massey*, 452 F. Supp. 361 (D. Conn. 1978), and the right to be free from the coercive and eugenic use of sterilization. *Skinner*, 316 U.S. at 541. Moreover, the right to bear children and to control decisions about childbearing options, including the timing and method of delivery, have all been recognized as within the protected zone of privacy, *see In re: A.C.*, 573 A.2d 1235 (D.C. App. 1990) (patient choice governs medical decision-making for pregnant patients); *Baby Boy Doe v. Doe*, No. 1-83-4322, 1994 Ill. App. LEXIS 501, at *1 (Ill. App. Ct. Apr. 5, 1994) (a woman's competent choice to refuse Cesarean section must be honored). Courts have repeatedly required that limitations on these rights be subject to the highest level of constitutional review.[17] As this Court noted in *Carey v. Population Servs.*

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[17] This Court has repeatedly recognized that an individual's right to

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Int'l, 431 U.S. 678, 685-86 (1977), "regulations imposing a burden on [these rights] may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."[18]

Central to a woman's procreative decisionmaking is her right to obtain information and to make decisions about genetic testing and her subsequent medical treatment during pregnancy, whether she carries the pregnancy to term or chooses abortion. "The cluster of constitutional choices . . . must also include the right to submit to a procedure designed to give information about [the] fetus." *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990), *aff'd*, 914 F.2d 260 (7th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991). *See also Margaret S. v. Treen*, 597 F. Supp. 636, 673 (1984), *aff'd on other grounds*, 794 F.2d 994 (5th Cir. 1986) (statute prohibiting fetal experimentation is unconstitutional because it "unduly limits the medical information obtainable through experimentation in that it deprives women of information concerning the likelihood of fetal deformity in their future

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[17] (...continued)
make informed medical decisions flows from principles of bodily integrity. *See Casey*, 112 S. Ct. at 2806 (Joint Opinion); *Id.* at 2840 (Stevens, J., concurring in part and dissenting in part) ("One aspect of [the woman's liberty] is a right to bodily integrity, a right to control one's person."); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 269 (1990) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body") (quoting *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914)).

[18] Despite this Court's recognition in *Casey* that the right to choose abortion derived from these fundamental rights, the Joint Opinion found that the countervailing state interest in potential fetal life demanded that the Court narrow the level of constitutional protection afforded to women seeking abortion. Thus, the Court applied the "undue burden" test when judging the constitutionality of abortion restrictions, *see infra* Point II. However, the strict scrutiny standard remains applicable to the interferences with procreative liberty discussed here because there are no countervailing interests in protecting fetal life at stake.

pregnancies"). Genetic testing enables individuals, particularly those with a history of genetic abnormalities, to conceive a child and become parents without the fear of passing on the disabling genetic trait to their offspring. The availability of genetic testing enables pregnant women and their families to make special preparations for the birth of a disabled child[19] and enables women to obtain *in utero* treatment or genetic transplants that will, upon birth, enhance the child's survival or health.[20] Thus, women's ability to use genetic testing lies at the heart of the privacy right and state laws that interfere with this right must be subject to the same strict standards of review used to measure the constitutionality of laws that infringe fundamental liberty interests.

The Pennsylvania statute cannot survive scrutiny under this strict standard. Denial of appropriate information about her pregnancy, including information about genetic testing that would have discovered Erica's Down syndrome, as well as the failure to inform her that Erica had been born with Down syndrome has denied Ms. Sejpal and her husband the ability to make voluntary and intelligent decisions about medical treatment and has caused

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[19] Contrary to the statutory presumption, not all women who discover genetic anomalies choose abortion. Between 1974 and 1978, researchers asked 297 women who had mid-trimester amniocentesis: "What would you have done if amniocentesis had not been available?" 12.4% of women studied either would have chosen not to become pregnant or chosen to have an abortion had amniocentesis not been available. Only two percent of women studied would have chosen to have an abortion had amniocentesis been available. *See* Letter to the Ed., *The Pro-Life Bonus of Amniocentesis*, 302 N. Eng. J. Med. 925 (1980).

[20] For example, fetal surgery is a treatment for various fetal anomalies including congenital diaphragmatic hernia, a birth defect in which the fetal diaphragm fails to close, or hydronephrosis, distension of the pelvis caused by obstruction of the ureter. *See* Michael T. Longaker et al., *Maternal Outcome After Open Fetal Surgery: A Review of the First 17 Human Cases*, 265 J. Am. Med. Assoc. 737 (1991); Thomas L. Pinckert, M.D., et al., *Fetal Surgery*, 15 Current Controversies in Perinatal Care 943 (1988).

Ms. Sejpal both to forego an abortion and to undergo a Cesarean section and sterilization operation that she otherwise would not have had. The state legislation, which denies the very remedy afforded to other persons harmed by medical wrongdoing, encourages this malfeasance. By providing safeharbor to physicians who knowingly violate settled norms of the medical profession, the Commonwealth compounds the physicians' interference with women's constitutionally protected rights to make procreative decisions.

Moreover, the statute is not narrowly drawn to further a compelling purpose. The state's interest in maternal health is not furthered by this restriction. A statute that encourages physicians to provide information and care below acceptable medical standards does not further women's health, indeed it is inimical to it. By encouraging physicians to withhold information that might enable women to plan for the birth of a disabled child or provide life-saving *in utero* treatment, the statute makes it more difficult for disabled infants to obtain appropriate assistance and health services. No state interest in health could possibly be served by this harsh policy.

II. THE CHALLENGED STATUTE IMPOSES AN "UNDUE BURDEN" ON A WOMAN'S RIGHT TO CHOOSE ABORTION.

A. The Purpose Of 42 Pa. Cons. Stat. § 8305 Is To Place A Substantial Obstacle In The Path Of A Woman Choosing Abortion.

In addition to violating an individual's fundamental right to make procreative decisions, the challenged statute imposes an "undue burden" on a woman's right to choose abortion and is therefore unconstitutional under this Court's ruling in *Planned Parenthood v. Casey*. 112 S. Ct. at 2791. In *Casey*, this Court elaborated on the meaning of an "undue burden":

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or

> effect of placing a substantial obstacle in the path of a woman seeking abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

112 S. Ct. at 2820.

The legislative history of the "wrongful birth" and "wrongful life" statute[21] establishes beyond any doubt that the Pennsylvania General Assembly specifically intended to impose a "substantial obstacle in the path of a woman seeking an abortion" and chose a means that was calculated to hinder, not inform, the woman's free choice. Thus, the statute violates the first prong of the *Casey* test.

42 Pa. Cons. Stat. § 8305 became law in 1988 after an almost identical piece of legislation was passed but vetoed by Governor Thornburgh in 1984.[22] This legislation was sponsored

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[21] Courts may turn to floor debate to shed light on legislative purpose. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 56-57 (1985) (examining state legislative floor statements to determine presence of secular purpose); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 (1977) (looking to contemporaneous statements by members of the decisionmaking body or minutes of its meetings to determine legislative intent).

[22] In his veto message, the Governor expressed concerns about the law's constitutionality:

> [T]he Supreme Court of the United States has clearly held that a woman has a constitutional right to an abortion, at least during the first trimester of her pregnancy. Under these

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by Rep. Stephen Freind and Sen. Joseph Rocks, the sponsors of a larger package of restrictive amendments to the 1982 Abortion Control Act, which have been the subject of litigation before this Court and lower federal courts for over a decade.[23]

The "wrongful birth" and "wrongful life" statute was described as a way to insulate anti-abortion physicians who, because of their opposition to abortion, refuse to give full and complete health information to women. For example, in House debates Rep. Freind stated, "the presence of these lawsuits. . . [is] requiring physicians against their will and against their conscience to practice recommending eugenic abortion," Pa. House Leg. J. 306 (Feb. 24, 1988), and, "[i]t is up to [the physician] to choose whether or not to advise a patient of the availability of certain procedures." Pa. House Leg. J. 1949 (Nov. 24, 1987). Rep. Freind repeatedly acknowledged that a physician who negligently failed to inform a woman of necessary information or even deliberately withheld information or misled a patient could not be subject to a lawsuit.[24] As Rep. Freind noted in his testimony in

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[22] (...continued)

> circumstances, the intelligent exercise of that right should not be made to depend on the competence, diligence, integrity or philosophical views of a particular attending physician.

Pa. Senate Leg. J. 2674 (Sept. 17, 1984) (veto message of Governor Thornburgh dated July 3, 1984).

[23] For a procedural history of this litigation, *see American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 287-89 (1986); *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1326-38 (E.D. Pa. 1990); *Planned Parenthood v. Casey*, 822 F. Supp. 227, 230-31 (E.D. Pa. 1993).

[24] This grant of immunity from liability to physicians who lie to their patients concerned several legislators. For example, Dr. Samuel Henck in testimony before a House Committee reviewing the legislation, stated that he regularly did not and would not inform his patients of the existence of amniocentesis out of fear that the test would lead his

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support of the "wrongful birth" and "wrongful life" legislation:

> until *Roe v. Wade* is reversed . . . those in the pro-life movement must be as aggressive and creative as possible in drafting and passing legislation which regulates and restricts abortions as much as possible.

Hearings on H.B. 1361 and H.B 1362 Before the House Judiciary Comm. (Nov. 12, 1987) (statement of Rep. Freind).

Several members of the General Assembly who opposed the bill specifically noted that the legislation was intended to harm women and to sanction the intentional withholding of important and relevant information from pregnant women by physicians who oppose abortion. For example, Senator Craig Lewis stated that these statutes would "shield and provide an absolute immunity . . . where clear and unquestioned negligence visits a lifelong financial damage upon the parents . . . ." Pa. Senate Leg. J. 1962 (March 22, 1988). The legislation was perhaps most accurately described by Senator James Greenwood:

> What it really is and what it really ought to be called is the legalized medical malpractice bill for anti-choice physicians in Pennsylvania.

Pa. Senate Leg. J. 1960 (March 22, 1988).[25] Given that the

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[24] (...continued)
patients to choose abortion. *Hearings on H.B. 1361 and H.B. 1362 Before the House Judiciary Comm.* (Nov. 12, 1987) (statement of Dr. Samuel H. Henck). As a result of this testimony, Representative David Heckler proposed an amendment to the 1987 Abortion Control Act which would have mandated that the State Board of Medicine require physicians to advise pregnant patients of the availability of maternal and fetal diagnostic tests, but the amendment was defeated. Pa. House Leg. J. 1949 (Nov. 24, 1987).

[25] Indeed, the statute's biased purpose -- insulating from tort liability
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"means chosen by the State to further the interest in potential life" is calculated to hinder rather than "inform the woman's free choice," *Casey*, 112 S. Ct. 2820, it is an unwarranted intrusion into women's liberty and must be invalidated by this Court.

B. The Challenged Statute Places A Substantial Obstacle In The Path Of A Woman's Abortion Choice.

The right to choose abortion, as established by this Court in *Roe* and reaffirmed in *Casey*, is essential to a woman's ability to make intimate decisions about her life and family, as well as to protect her bodily integrity. Implicit in and central to this right to choose is the woman's right to be given all relevant and necessary information, so that she can make both an informed and meaningful decision. This is particularly important where, as here, the woman is "entitled to rely [on her physician] for advice in connection with her decision." *Whalen v. Roe*, 429 U.S. 589, 605 n.33 (1977). Legislation which insulates physicians and encourages them to keep necessary and relevant information from women, violating professional standards and denying women meaningful reproductive choice, permits fundamental reproductive liberties to be subject to the arbitrary and private moral views of

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[25] (...continued)
those physicians who do not reveal relevant and necessary information that might lead a pregnant woman to choose abortion, but imposing liability on physicians who are alleged to have negligently performed an abortion -- is apparent from the face of the legislation. 42 Pa. Cons. Stat. § 8305 (a) provides: "Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman or a child, as a result of an attempted abortion." This bias is further confirmed by the fact that the 1982 Abortion Control Act, by amendments passed in 1988 and 1989, imposed obligations on physicians who perform abortions to disclose a litany of state mandated information in the interest of an "informed choice." *See* 18 Pa. Cons. Stat. §§ 3205, 3208.

these professionals. *See Carey*, 431 U.S. at 693 n.24 (1977).[26]

In *Casey*, this Court upheld a requirement that a physician provide information relevant to a woman's informed consent "as a reasonable means to insure that the woman's consent is informed." 112 S. Ct. at 2824-25. The Court emphasized, however, that such information must be "truthful and not misleading," *id.* at 2823, and "must be calculated to inform the woman's free choice, not hinder it." *Id.* at 2820.

Moreover, the Court made clear that state requirements compelling a physician to provide false or misleading information or legislative attempts to prejudice the woman's decision through the provision of incomplete information are impermissible.

> [W]e have upheld regulations of abortion that are not efforts to sway or direct a woman's choice but rather are efforts to enhance the deliberative quality of that decision or are neutral regulations on the health aspects of her decision . . . . Conversely, we have consistently rejected state efforts to prejudice a woman's choice, either by limiting the information available to her, *see Bigelow v. Virginia*, 421 U.S. 809 (1975), or by "requir[ing] the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'"

112 S. Ct. at 2841 (Stevens, J., concurring in part and dissenting

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[26] To help a patient make an informed decision, health care professionals have a legal and professional duty to inform a patient of all treatment options. The doctrine of informed consent dictates the dialogue that must take place between physician and patient. *See Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Canterbury v. Spence*, 464 F.2d 772, 783 n.36 (D.C. Cir. 1972) ("Duty to disclose is more than a call to speak merely on the patient's request, or merely to answer the patient's questions; it is a duty to volunteer, if necessary, the information the patient needs for intelligent decision."), *cert. denied*, 409 U.S. 1064 (1972).

in part) (citations omitted).[27]

As this Court established in *Casey*, "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects." 112 S. Ct. at 2829. *See also infra* Point II.C. Both for Ms. Sejpal, who was denied essential information about and access to genetic screening and who, as a result, carried to term a pregnancy that she otherwise would have terminated, as well as for "a large fraction" of other women, who are similarly denied essential health information, the prohibition of "wrongful birth" and "wrongful life" actions has operated to deny their reproductive choice. *See Casey*, 112 S. Ct. at 2829; *Carey*, 431 U.S. at 686-87. By encouraging physicians to keep from their patients information relevant to decisions about abortion, the state places its imprimatur upon the false and misleading dialogue between physician and patient as surely as if the state itself was in the examining room. The statute must therefore be found unconstitutional under *Casey*.

C. Dismissal Of Their Claims Without Affording Plaintiffs An Opportunity To Present Evidence Conflicts With This Court's Ruling In *Planned Parenthood v. Casey*.

The lower courts dismissed petitioners' "wrongful birth" and "wrongful life" claims on respondents' Preliminary Objections.

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[27] Justice Stevens added,

> "[I]t may be argued that the [statute] is justified by the mere fact that it is likely to reduce the number of abortions, thus furthering the State's interest in potential life. But such an argument would justify any form of coercion that placed an obstacle in the woman's path. The State cannot further its interests by simply wearing down the ability of the pregnant woman to exercise her constitutional right."

Casey, 112 S. Ct. at 2841 (Stevens, J., concurring in part and dissenting in part).

As a result, petitioners never had an opportunity to prove that the challenged statute has both the purpose and effect of imposing an "undue burden" on a woman's ability to choose abortion.

The Joint Opinion in *Casey* clearly established that the determination of whether or not a law imposes an "undue burden" is not merely a legal conclusion. When holding unconstitutional Pennsylvania's husband notification provision, the Court made an individualized factual assessment whether the restriction had an unconstitutional purpose or effect. The Court closely examined the effect of the statute on the ability of women to choose abortion, measuring the law's impact on the women who were actually affected by it. The Joint Opinion found:

> Respondents attempt to avoid the conclusion that § 3209 is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions . . . . We disagree with respondents' basic method of analysis. The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects . . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

112 S. Ct. at 2829.

That *Casey* established a new standard requiring lower courts to conduct an individualized fact-based analysis to determine whether a challenged statute unduly burdens a woman's right to choose abortion was recently emphasized by Justice O'Connor in her concurring opinion in *Fargo Women's Health Org. v. Schafer*, 113 S. Ct. 1668 (1993). In response to a lower court's dismissal of a facial challenge to North Dakota's abortion restrictions under *United States v. Salerno*, 481 U.S. 739, 745 (1987) (facial challenge must be rejected unless there exists *no set of circumstances* in which the statute constitutionally can be applied), Justice O'Connor, joined by Justice Souter, noted:

> In striking down Pennsylvania's spousal-notice provision, we did not require petitioners to show that the provision would be invalid in *all* circumstances. Rather, we made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.' And the Joint Opinion specially examined the record developed in the district court in determining that Pennsylvania's informed-consent provision did not create an undue burden. While I express no view as to whether the particular provisions at issue in this case constitute an undue burden, I believe the lower courts should have undertaken the same analysis.

Fargo, 113 S. Ct. at 1669 (citations omitted) (emphasis in original).

Justice Souter recently reiterated that courts must conduct a fact-based analysis when assessing laws that interfere with a woman's right to choose abortion. *See Planned Parenthood v. Casey*, 114 S. Ct. 909 (1994) (Souter, J., Circuit Justice) (rejecting petitioners' request to reopen the record but emphasizing that similar litigants are free to bring facial and "as applied" challenges).[28]

Casey and the caselaw discussed above addresses the need for an individual evidentiary hearing in *facial* challenges to abortion restrictions. Here, however, petitioners challenge Pennsylvania's "wrongful birth" and "wrongful life" statute *as*

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[28] *See also Planned Parenthood v. Casey*, 14 F.3d 848, 861 (3rd Cir. 1994) ("[a]t a minimum, we believe the Court meant [in *Casey*] that . . . state abortion laws require individualized application of the undue burden standard"); *id.* at 863 n.21 ("the Court has, in this case, set a new standard for facial challenges to pre-viability abortion laws . . . . *Casey* requires only that a plaintiff show an abortion regulation would be an undue burden 'in a large fraction of the cases.'").

applied to their circumstances. That plaintiffs are entitled to an evidentiary hearing to demonstrate how the challenged statute imposes an "undue burden" on Ms. Sejpal's ability to obtain an abortion is thus even clearer. *See Ada v. Guam*, 113 S. Ct. 633 (1992) (Scalia, J., dissenting from denial of petition for a writ of certiorari) ("Statutes are ordinarily challenged, and their constitutionality evaluated, 'as applied' -- that is, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional.) (citing *Salerno*, 481 U.S. at 745).

CONCLUSION

Because the lower courts dismissed petitioners' "wrongful birth" and "wrongful life" claims without providing them an opportunity to present evidence, petitioners respectfully request that this Court grant the Petition for a Writ of Certiorari, reverse the decision of the Supreme Court of Pennsylvania, and remand this action to the lower court for further proceedings. The remand will enable the lower court to determine whether the challenged statute interferes with a woman's right to procreative liberty and, if so, whether that interference is supported by a compelling state interest that is narrowly drawn to support only that interest; whether the law has either the purpose or effect of imposing an "undue burden" on pregnant women's right to choose abortion; and finally the extent to which petitioners are entitled to recover damages on their claims for "wrongful life" and "wrongful birth." To avoid manifest injustice to the Sejpals, whose rights were violated, granting the Writ and then remanding the case is both necessary and appropriate.

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